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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RONALD LERCH,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER RONALD L LERCH'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ISSUE I

Whether the due process clause of the Fifth Amendment to the Constitution requires consideration of a claim that a prejudicial loss of memory has been occasioned by excessive pre-indictment delay?

Petitioner answers "Yes"

ISSUE II

Whether the Court of Appeals erred in failing to determine the jury instructions relative to the elements of Title 18 USC Section 152 and affirmative sua sponte instructions relieved the Government of its burden of proving that petitioner had the requisite specific intent?

Petitioner answers "Yes"

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OCTOBER TERM, 1993

No. _____

RONALD LERCH,

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v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Ronald Lerch, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming his convictions pursuant to Title 18 USC Sec. 152 as being contrary to *United States v. Marion*, 404 US 307, 92 SCt 455, 30 LEd 2d 468 (1971); *United States v. Lovasco*, 431 US 783, 97 SCt 2044, 52 LEd 2d 752 (1977); *Doggett v. United States*, _____ US _____, 112 SCt 2686, 120 LEd 2d 520 (1992); *Rose v. Clark*, 478 US 570, 106 SCt 3101, 92 LEd 2d 460 (1986); *In Re Winship*, 397 US 358, 364; 90 SCt 1068, 25 LEd 2d 368 (1970); *Cheeks v. United States*, _____ US _____, 111 SCt 604, 112 LEd 2d 617 (1991) and further creating a conflict between circuits.

OPINIONS BELOW

The opinions from below include the published opinion of the United States Court of Appeals for the Seventh Circuit decided June 4, 1993, which appears in Appendix A. The unpublished Order of the United States Court of Appeals denying Petitioner's Request for Reconsideration and Rehearing En Banc dated July 7, 1993, appears in Appendix B.

JURISDICTION OF THE COURT

The Court of Appeals' opinion in this matter was filed on or about June 4, 1993. A timely Petition for Rehearing was filed and denied by the Court of Appeals on July 7, 1993. This Court's jurisdiction is invoked pursuant to Title 28 USC Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service and time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 USC Sec. 152 in pertinent part provides:

> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any case under Title 11; or
>
> Whoever knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under Sec. 1746 of Title 28, United States Code, in or in relation to any case under Title 11, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On April 24, 1991, a federal grand jury in Fort Wayne, Indiana, returned a three count indictment alleging violations of Title 18 USC Sec. 152. Trial by jury was commenced in the United States District Court for the Northern District of Indiana, Fort Wayne Division, the Honorable Allen Sharp presiding, on January 12, 1992. On January 28,

1992, the jury returned guilty verdicts as to all three counts. On March 26, 1992, Petitioner was sentenced to three concurrent terms of five years and three consecutive fines of $5,000.00 were imposed. Petitioner then appealed his convictions to the United States Court of Appeals for the Seventh Judicial Circuit. On or about June 4, 1993, the Court of Appeals affirmed Petitioner's convictions. A subsequent petition for reconsideration was denied on or about July 7, 1993.

This Petition for Writ of Certiorari raises two issues. The procedural history and relevant facts pertaining to each issue are as follows:

A. Pre-Indictment Delay

In 1983, the Internal Revenue Service conducted audits of Petitioner's tax returns for years 1977 through 1981. The audits resulted in notice of tax deficiencies. Petitioner sought relief by petitioning the United States Tax Court, through his attorney and government witness, Mr. Grant. The tax matters were set for trial on April 28, 1986.

Prior to the scheduled trial date, Mr. Grant conferred with Mr. David Peebles, a bankruptcy attorney, on several occasions. Government witness Peebles indicated he had a two hour conference with Petitioner in January of 1986 and at this time he called Mr. Grant. A subsequent meeting took place at Petitioner's home at which attorneys Grant, Peebles and Hayes attended.

The subject matter of these meetings pertained to a strategy for litigation of the tax matters. Mr. Grant advised Petitioner that bankruptcy Court would provide a more favorable forum in which to litigate his tax issues. (TT pp 1127-1128) Mr. Peebles concurred in this analysis. (TT p 811) Government witness and IRS attorney Klingenberger concurred in the propriety of litigating tax matters in the bankruptcy Court. (TT pp 470, 553)

According to David Peebles, the decision to actually file the bankruptcy petition was made by Mr. Grant on or about April 21, 1986. (TT p 826) In order to have the tax matters litigated in bankruptcy court, it was necessary to file the petition before the Tax Court date. (TT p 824) Mr. Peebles prepared and caused to be filed Petitioner's bankruptcy petition under Title 11 of the United Stated Code on April 23, 1986, five days prior to the scheduled Tax Court trial. (TT p 471)

Upon filing of the bankruptcy petition an automatic stay of proceedings resulted regarding the Tax Court proceedings. The government filed motions in the bankruptcy court for the purpose of dissolving the automatic stay. The bankruptcy court granted the

government's motion on April 28, 1986. Thereafter, Petitioner appeared before the Tax Court pro se and litigated the tax matters on May 1 and 2, 1986.

Mr. Peebles testified that he provided Petitioner with a blank statement of affairs and schedule of debts and assets to fill out. He instructed Petitioner to fill them out [1]. When Petitioner returned with the forms, they were filled "in part" in Petitioner's handwriting. (TT p 768) The forms were typed and Petitioner signed them on May 13, 1986. (TT p 783) The forms were filed in the bankruptcy court on May 14, 1986. (TT pp 484, 486) These filings formed the basis of Counts I and II, respectively.

Count I of the indictment alleged that on or about May 14, 1986, Petitioner knowingly and fraudulently caused to be filed a false Statement of Affairs in connection with the proceeding instituted pursuant to Title 11, United States Code, under Penalty of Perjury, Title 28 USC Sec. 1746, in violation of Title 18 USC Sec. 152. Count II of the indictment alleged that on or about May 14, 1986, Petitioner knowingly and fraudulently caused to be filed a false Schedule of Debts and Assets in connection with a proceeding instituted pursuant to Title 11, United States Code, under Penalty of Perjury, Title 18 USC Sec. 1746, in violation of Title 18 USC Sec. 152.

On or about May 20, 1986, Petitioner attended a creditor's examination conducted pursuant to Sec. 341 of the Bankruptcy Code with Mr. Peebles. Petitioner's appearance at this proceeding formed the basis of Count III, which alleged that Petitioner knowingly and fraudulently gave a false oath in connection with a Sec. 341 proceeding of Title 11, United States Code, in violation of Title 18 USC Sec. 152.

A period of 4 years 11 months elapsed prior to the Grand Jury indictment being returned against Petitioner on April 24, 1991.

Prior to trial, Petitioner filed a Motion seeking dismissal of the indictment on the grounds of pre-indictment delay. The Court held its

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After filing a bankruptcy petition, the petitioner has fifteen days to file a statement of financial affairs and schedule of debts and assets. Both filings are required to be signed under the penalty of perjury. 28 USC Sec 1746. Here, Petitioner's bankruptcy attorney obtained an extension of time from May 8, 1986 to May 15, 1986 to file same.

ruling in abeyance to rule post-trial on this motion so that trial testimony could be employed in determining prejudice. Subsequent to conviction, briefs were submitted and on March 2, 1992, a Memorandum and Order were entered denying Petitioner's motion. Petitioner then raised the issue before the United States Court of Appeals for the Seventh Circuit on his appeal of right.[2]

At issue were dates of property transfers from the date of the filing of the bankruptcy petition. Had the transfers occurred a year or more prior to the bankruptcy filings, there could be no criminal liability.

On appeal, Petitioner contended that the nearly five year passage of time between the last act which formed the basis of the indictment and the indictment, served to prejudice Petitioner and deprive him the right of putting forth a defense as well as giving the government a tactical advantage over Petitioner. Petitioner demonstrated no less than seven instances of memory loss occasioned by the pre-indictment delay which he asserted actually prejudiced him and gave the government a tactical advantage. They were:

> 1. Petitioner's bankruptcy counsel, Mr. Peebles, testified that his records showed that during 1985 and 1986 he had numerous meetings with Defendant, accountants and tax attorneys regarding Mr. Lerch, but could not remember the substance of these discussions.
>
> 2. Mr. Peebles could not recall giving Petitioner specific instructions regarding the filling out of the statement of affairs or schedule of debts and assets which form the basis of Counts I and II.

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The opinion of the Seventh Circuit indicates that Petitioner failed to set forth a legal basis for this claim of relief in his Brief; however, examination of his Brief on Appeal reveals that in the opening paragraph of his argument, he cites and quotes *United States v. Ashford*, 924 F2d 1416 (7th Cir. 1991) which in pertinent part states as follows: ". . . a defendant who complains that the government waited too long to bring his or her indictment is not bereft of constitutional protection. Rather, as the Supreme Court held in *U.S. v. Lovasco*, 'the Due Process Clause has a limited role to play in protecting against oppressive delay.' (citations omitted) To successfully advance a claim that pre-indictment delay violated due process, a defendant must 'prove that the delay caused actual and substantial prejudice to his or her fair trial rights and that the government delayed indictment for tactical advantage or some other impermissible reason.' (citations omitted)

3. Mr. Peebles could not recall whether he asked Petitioner if he understood the questions on the bankruptcy forms regardless of whether they were self-evident or not.

4. Regarding the subject matter of deeds here at issue, Mr. Peebles could not recall which specific properties were the subject of the deeds produced by Petitioner at the time the schedules which form the basis of Counts I and II were prepared.

5. Neil Hayes, one of Petitioner's family lawyers, testified that he attended meetings with Mr. Grant, Petitioner's tax attorney, and Mr. Peebles, at Petitioner's home, however, could not recall the substance of the meetings.

6. Mr. Hayes could not recall anything relevant to the bankruptcy proceedings between the dates of April 23, 1986 and May 20, 1986.

7. Mr. Hayes was unable to recall any of the events surrounding preparation of government Exhibit 7, a deed dated May 24, 1984 from Petitioner to K. A. Arajo, which deed was prepared in his office, by his staff, and may have been prepared by his father who died in 1986.

The primary issue for jury determination in this case was the intent of Petitioner in May 1986 when he signed the unsworn declarations which form the basis of Counts I and II. The questions to these witnesses sought information that went directly to Petitioner's actions, statements and intent at and prior to the time he filed bankruptcy. Petitioner could not present this evidence because the passage of time prevented his attorney, Mr. Peebles, who had approved his actions, from recalling events or identifying documents he relied on in passing on Petitioner's action.

To refute Petitioner's argument, the government argued Petitioner either produced the deeds for the property he transferred and lied about the preparer of the deeds, or provided some other deeds and failed to inform Peebles of the property he had transferred. They argued attorney Peebles indicated that Petitioner did not inform him of certain lake property, two vacant lots, or the identity of one K. A. Arajo, prior to the Sec. 341 hearing. However, attorney Peebles was unequivocal in his testimony indicating that he felt any errors and/or omissions from the filings which formed the basis of Counts I and II were inadvertent. (TT p 853)

Petitioner, in addition to arguing bad faith, also argued the lapse of time and attendant loss of memory occasioned by the delay gave the government a tactical advantage which intensified over time. Petitioner specifically noted that nothing of substantive evidentiary value changed or was discovered from 1986 to the date of indictment, April 24, 1991, which would serve a valid investigative purpose.

The Court of Appeals rejected Petitioner's claim that prejudice could be shown through the loss of memory, "*United States v. Brock*, 782 F2d 1442, 1444 & 1447 (7th Cir. 1986) (prejudice cannot be shown through the loss of memory)." (Slip Op. pg 9)

B. Jury Instructions

The following facts relate to the jury instruction issue:

Mr. Peebles, who was qualified as an expert in this cause, also testified that often times there are errors and omissions on required filings such as the statement of affairs and schedule of debts and assets. (TT p 848) He indicated the usual remedy, as a matter of practice, was to contact the trustee to determine how the situation should be corrected, or the errors or omissions could be cured by formal amendment to the filings. (TT p 848) Peebles indicated he had conversations with counsel for the government "early on" regarding amending the filings. (TT p 850) He also indicated he mailed letters to both the bankruptcy trustee, Mr. Boyer, and counsel for the IRS, Mr. Klingenberger, in which he requested instructions as to the necessity of filing formal amendments or just bringing omitted properties back into Petitioner's/ Debtor's estate. (TT p 852) The letter uses the phrase, "I would like to mention the inadvertent errors in the schedules." (TT p 853) According to Mr. Peebles, the phrase referenced his belief that confusion of the dates of transfers of property, which are the subject of the indictment, were inadvertent on Petitioner's part. (TT p 853)

In apparent response to this evidence and over Petitioner's objection, the trial court, during the instructional phase of trial, gave the following jury instruction sua sponte:

> You are instructed that *no timely request* was made by or on behalf of this defendant to amend, change or correct information provided on bankruptcy petitions, schedules or testimony given on or about May 20, 1986. (Emphasis Ours) (TT p 1445)

On appeal, Petitioner claimed the instructions amounted to a directed verdict for the government on the issue of intent in regard to

Counts I and II. The Court of Appeals held that it did not amount to a directed verdict for the government because it did not preclude the jury from considering Petitioner's claim of inadvertence as the Court had specifically instructed the jury that it could not find Petitioner guilty if it found that he acted through ignorance, mistake, inadvertence or accident.

In regard to the Sec. 341 hearing, Mr. Peebles testified that he did not consider it to be matter of record as the information from this hearing could not be brought before the bankruptcy judge except for impeachment purposes. (TT pp 867-868)

In apparent response to Mr. Peebles' testimony that he did not consider the Sec. 341 hearing a matter of record, the trial court, over objection, gave the following instruction to the jury sua sponte:

> *There is nothing* in the nature of the Bankruptcy proceedings held on or about May 20, 1986, *that would excuse this Defendant from giving truthful answers* to the questions asked. (Emphasis Ours) (TT p 1445)

On appeal, Petitioner argued the jury instruction directed a verdict as to Count III. The Court held it did not amount to a directed verdict on the issue of Petitioner's intent because it was directed at the nature of a Sec. 341 hearing, not at Petitioner's intent. The Court felt the instruction was justified in view of Peebles' testimony that he did not consider a Sec. 341 hearing to be a matter of record.

Petitioner also objected to and appealed the trial court's failure to instruct the jury relative to specific intent with respect to Counts I and II of the indictment. The trial court instructed the jury as follows:

> With respect to the offenses charged in Counts I and II of the indictment . . .; (TT p 1432)
>
> First, a proceeding in bankruptcy existed under Title 11;
>
> Second, the Defendant made an oath, account, declaration, certification, verification, statement under penalty of perjury in relation to said bankruptcy proceedings;
>
> Third, the oath, account, declaration, certification, verification, statement under penalty of perjury related to some material matter;

> Fourth, the oath, account, declaration, certification, verification, statement under penalty of perjury was false; and
>
> Fifth, the Defendant made such oath, account, declaration, certification, verification, statement under penalty of perjury knowingly and fraudulently. (TT p 1433)

As to the definition of the term "knowingly" the Court instructed:

> When the word knowingly is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake, inadvertence or accident. Knowledge may be proven by the defendant's conduct and by all of the facts and circumstances surrounding the case. (TT pp 1444-1445)

The jury was also instructed:

> You may find evidence of an intent to commit the crime charged even though there is coupled with that intent, the desire to accomplish some other purpose. (TT p 1428)

Petitioner claimed the trial court directed a verdict as to Counts I and II of the indictment as a result of its complete failure to instruct on the specific intent requirement of Title 18 USC Sec. 152.

The Court of Appeal's decision does not conclude the trial court's instruction relative to Counts I an II to be sufficient. Instead, the panel concludes that, "Additional instructions, together with the quoted instruction of the elements of Sec. 152, adequately address the issue of intent." (Slip Op. pg 5)

Of the two "additional instructions" referenced by the Court of Appeals, only the knowledge instruction was given in reference to the instructions as a whole. The other "additional instruction" referenced by the Court of Appeals was that, "An act is done fraudulently if done with the intent to deceive or cheat any creditor, trustee, or bankruptcy judge". (Slip Op. pg 5) This instruction was given in reference to Count III only. The elements of Count III, which alleged the giving of a false oath at a bankruptcy creditor's exam were not defined at the same point in time of the instructions that the elements of Counts I and II were defined. At no time was the jury instructed to consider this instruction in relation to Counts I and II or the instructions as a whole.

REASONS FOR GRANTING THE WRIT

ISSUE I

WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION REQUIRES CONSIDERATION OF A CLAIM THAT A PREJUDICIAL LOSS OF MEMORY HAS BEEN OCCASIONED BY EXCESSIVE PRE-INDICTMENT DELAY.

The Court of Appeals' conclusion that the necessary showing of prejudice to advance a claim of pre-indictment delay cannot be shown through loss of memory is in error. The conclusion misconstrues this Court's decision in *United States v. Marion*, 404 US 307, 92 SCt 455, 30 LEd 2d 468 (1971) and is in conflict with decisions of the First and Ninth Circuits, among others.[3] Furthermore, the decision significantly departs from the due process principles adhered to in *Doggett v. United States*, _____ US _____, 112 SCt 2686, 120 LEd 2d 520 (1992). The denial of Petitioner's claim has resulted in a violation of due process and presents an appropriate and necessary cause for the exercise of this Court's discretionary jurisdiction.

In *United States v. Marion*, (supra), this Court considered for constitutional purposes the significance of a lengthy pre-indictment delay. This Court, quoting *United States v. Ewell*, 386 US at 122, 86 SCt at 777, said, "The applicable statute of limitations . . . is . . . the primary guaranty against bringing overly stale criminal charges." *Marion* at 322. However, this Court affirmatively acknowledged, "The statute of limitations does not fully define the [defendant's] rights with respect to the events occurring prior to indictment" *Id.* at 324. The due process clause has a role, albeit limited, to play in protecting against oppressive delay. *United States v Lovasco*, 431 US 783, 97 SCt 2044, 52 LEd 2d 752 (1977). In *Lovasco*, (supra), this Court reiterated its observation

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In addition to the First and Ninth Circuits, the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits will consider loss of memory as a means of establishing prejudice for pre-indictment claims. See, e.g., *United States v. Sebetich* 776 F2d 412 (3rd Cir. 1985) *United States v. Scott*, 795 F2d 1245 (5th Cir. 1986); *United States v. Meyer*, 906 F2d 1247 (8th Cir. 1990); *United States v. Comosona*, 848 F2d 1110 (10th Cir. 1988); *United States v. Corbin* 734 F2d 643 (11th Cir. 1984). The Second Circuit is in agreement with the Seventh Circuit. *United States v. Elsbery*, 602 F2d 1054 (2nd Cir. 1979) cert. den. 444 US 994, 100 SCt 529, 62 LEd 2d 425 (1979) (fact that witness memory dims over time is not the sort of actual substantial prejudice that predicates reversal for pre-indictment delay).

from *Marion*, (supra), that it could not determine in the abstract under what circumstances dismissal would be required for pre-indictment delay and; therefore, left to the lower courts the task of determining the application of the due process principles announced.

Left to its own devices, the Seventh Circuit has, among other things,[4] determined that prejudice cannot be demonstrated through loss of memory (Lerch, Slip Op. pg 9 citing *United States v. Brock*, 782 F2d 1442 (7th Cir. 1986)) The rule exceeds any pronounced standard of this Court and defies notions of due process. Indeed, this Court in *Marion*, (supra), specifically notes that:

> Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. *Marion* at 322.

This Court further indicated that *Marion's* claims, in the absence of trial testimony, were premature and speculative. The Court, therefore, left the determination of whether prejudice could be established through memory loss open.

The Seventh Circuit rule has also created a conflict between the First and Ninth Circuits, among others, which do not preclude consideration of loss of memory due to the passage of time.

In *United States v. Porter*, 924 F2d 395, 398 (1st Cir. 1991), the court rejected Porter's claim of memory loss and consistent with this Court's decision in *Marion*, (supra), recognized that memory loss may work to the Defendant's advantage. Despite rejecting his claim, the Court

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There exists conflicting authority within the Seventh Circuit as to whether the defendant bears the burden of proving that the government delayed indictment for an impermissible purpose. Compare *United States v. Solomon*, 688 F.2d 1171, 1179 (7th Cir. 1982) ("The government need not explain the reason for the delay until after the defendant has met his burden of establishing actual prejudice."), and *United States v. King*, 593 F.2d 269, 272 (7th Cir. 1979) ("Once the defendant has proven (1) actual prejudice; (2) resulting from the delay, the burden shifts to the Government to show why the delay was necessary."), with *United States v. Watkins*, 709 F.2d 478, 479 (7th Cir. 1983) ("A pre-indictment delay will not violate due process unless the defendant is able to prove that the delay caused actual and substantial prejudice . . . and that the government delayed indictment for tactical advantage or some other impermissible reason."), and *United States v. Sweeney*, 688 F.2d 1131, 1139 (7th Cir. 1982) ("The defendants must establish that they were actually prejudiced by the delay, that the delay was unnecessary, and further that there was an ulterior motive on the part of the prosecution to interfere with the defendants' trial.").

implicitly recognized the potential validity of such a claim under proper circumstances.

One year after this Court decided *Lovasco*, (supra), the Ninth Circuit decided *United States v. Pallan*, 571 F2d 497 (1978). The Court stated that:

> Whether an assertion of lost testimony and dimmed memories is an adequate showing of the type of prejudice necessary to establish a due process violation perhaps remains an open question. *Pallan* at 501.

Seven years later, the Ninth Circuit approached the question once again in *United States v. Moran*, 759 F2d 777 (1985), but found it unnecessary to reverse "on this close question" as they found the district Court erred in its application of the second prong of the pre-indictment delay test. *Moran* at 783. In 1992, the Ninth Circuit decided *United States v. Sherlock*, 962 F2d 1349 wherein they note that lost testimony generally falls within the ambit of the statute of limitations but still determined the question of whether memory lapses prejudiced Defendant's right to a fair trial.

In none of the aforementioned cases does a defendant prevail on the loss of memory claim, each defendant, however, is afforded the opportunity of litigating his claim as a result of this Court's recognition that dismissal for pre-indictment delay may be necessitated by virtue of the due process clause of the Fifth Amendment. The rule advanced by the Seventh Circuit and here applied, that prejudice for pre-indictment delay cannot be demonstrated through memory loss, totally precluded the consideration and administration of due process. Viewed in this light, the significance of the conflict between the circuits is extremely apparent.

In *Lovasco*, (supra), this Court enumerated prosecutorial concerns and objectives which have been deemed adequate to explain or cause delay.[5] The Seventh Circuit rule by precluding loss of memory, removes a countervailing consideration which can effectively offset these claims. Memory loss is a human frailty and a reality which due process has

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The court specifically notes that requiring the prosecution to advance to file public charges as soon as guilt has been developed could frustrate prosecution in multiple offender cases, could prematurely require prosecution before proofs were actually adequate, and could require the government to make charging decisions prior to giving full consideration to the desirability of not charging at all.

always recognized just as it has recognized the legitimate prosecutorial concerns. If due process prevents delays which result in unfair and unnecessary detriment to the defendant's ability to defend himself, *United States v. Barket*, 530 F2d 189, 193 (8th Cir. 1976), then prohibiting the consideration of loss of memory can do nothing more than deny due process.

This was not a controlled substance case or a rape case where the primary issue being determined was whether the defendant committed the act indicted on. This was a case in which the jury was asked to determine the intent of Petitioner at the time he signed unsworn declarations and testified at a creditor's exam 4 years and 11 months prior to the date of indictment. The reliability of the evidence used by the government to gain convictions in this cause was totally dependent on the memories of Petitioner's bankruptcy attorney, Mr. Peebles, and attorney Neil Hayes, whose office prepared deeds. The record and briefs filed in this cause are replete with references to both witnesses' lack of memory. Mr. Peebles, who prepared Petitioner's Bankruptcy Petition, could not recall what instructions, if any, he gave to Petitioner in regard to filling out the schedules which form the basis of this indictment. This is especially significant in that the stated purpose of the filing of bankruptcy was to provide a forum in which to litigate Petitioner's tax matters. The government acknowledges that Peebles could not recall the substance of conversation surrounding the bankruptcy filings or the identity of properties contained in deeds proffered Petitioner and examined by him. Likewise, Mr. Hayes testified as to a total lack of memory surrounding the circumstances of his office's preparation of deeds. Even the government had to engage in speculation to make factual recitations to support their theory that Petitioner lied or otherwise withheld information from Peebles or Hayes. Clearly as a result of the passage of time, Petitioner was actually and substantially prejudiced requiring dismissal of the indictment.

Measuring an individual's intent at the time he signed a form is a difficult task even when a short period of time has elapsed. However, when 4 years and 11 months elapse between the last act which forms the basis of the indictment and the indictment itself, the loss of memory in a case such as this inures to the benefit of the government and gives them a tactical advantage unintended and in violation of the due process clause of the Fifth Amendment.

Pending appeal of this cause, this Court decided *Doggett v. United States*, (supra), wherein the government attempted to argue the speedy

trial clause of the Sixth Amendment did not protect a criminal defendant's interest in judicial accuracy. At footnote 2, this Court said:

> Thus, we reject the government's argument that the effective delay on adjudicative accuracy is exclusively a matter for consideration under the due process clause. We leave in tact our earlier observation, see *United States v. MacDonald*, 456 US 1, 7, 102 SCt 1497, 1501, 71 LEd 2d 696 (1982), that a defendant may invoke due process to challenge delay both before and after official accusation. *Doggett* at 2692.

This Court further indicated that:

> Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. *Doggett* at 2693.

This Court further adhered to the principle that prejudice intensifies over time.

Petitioner argued that due process concerns, which permeated the Doggett decision, should have application to the case at bar. Since judicial accuracy is a due process concern said reasoning and due process itself require recognition that as time and attendant memory lapses occur, the reliability of the trial can be compromised beyond the tolerable limits of due process. Such is the case here.

In conclusion, this Court should order the response of the Solicitor General and grant the Petition for Writ of Certiorari. The adherence of the Seventh Circuit to a rule which prohibits the consideration of loss of memory due to delay directly contravenes this Court's interpretation of due process, creates a significant conflict between the circuits, and thus serves to deprive litigants, as was demonstrated here, to the due process guaranteed by the Fifth Amendment. This cannot be condoned.

ISSUE II

WHETHER THE COURT OF APPEALS ERRED IN FAILING TO DETERMINE THE JURY INSTRUCTIONS RELATIVE TO THE ELEMENTS OF TITLE 18 USC SECTION 152 AND AFFIRMATIVE SUA SPONTE INSTRUCTIONS RELIEVED THE GOVERNMENT OF ITS BURDEN OF PROVING THAT PETITIONER HAD THE REQUISITE SPECIFIC INTENT

The Court of Appeals' denial of Petitioner's requested relief presents an appropriate and necessary exercise of this Court's discretionary jurisdiction as it decided an important question of federal statutory law that conflicts with applicable decisions of this Court.

To sustain a conviction under Title 18 USC Sec 152 requires a showing and a finding by the jury that Petitioner acted with specific intent. In *United States v. Key*, 859 F2d 1257, 1260 (7th Cir. 1988), the Court held:

> The essence of the offense under Sec. 152 is the making of a materially false statement or oath with the intent to defraud the bankruptcy court.

The Court of Appeals' analysis here clearly indicates the trial court, in relation to Counts I and II, failed to appropriately instruct on the specific intent element. Indeed, the Court of Appeals points to what they label an "additional instruction" which was given in relation to Count III only, to hold the jury was properly instructed in regard to Counts I and II. Counts I and II contained no such instruction nor was the jury advised at any time that it could apply the instruction to Counts I and II.

An undisputed principle central to our system of constitutional criminal jurisprudence is that a trial court may not direct a verdict against an accused. *United States v. Martin Linen Supply Company*, 430 US 564, 572-73, 97 SCt 1349, 51 LEd 2d 642 (1977); *Carpenter v. United States*, 330 US 395, 67 SCt 775, 91 LEd 978 (1947). In any criminal trial, the question is not whether the guilt of the accused "may be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials." *Bollenback v. United States*, 327 US 607, 614 (1946). The Constitution mandates that each element of a charged crime be proven beyond a jury's reasonable doubt. *In Re Winship*, 397 US 358 (1970). The court's failure to properly instruct on the law deprives the jury of its fact-finding function and amounts to a directed verdict. *Rose v. Clark*, 478 US 570, 106 SCt 3101, 92 LEd 2d 460 (1986).

Had the additional instruction that "an act is done fraudulently if done with the intent to deceive or cheat any creditor . . ." been given in relationship to the instruction as a whole the circumstance might be different. However, the instruction was given with regard to Count III only. Jurors are presumed to follow their instructions. *Richardson v. Marsh*, 481 US 200, 107 SCt 1702, 95 LEd 2d 176 (1987). In *Francis v.*

Franklin, 471 US 307, 105 SCt 1965, 85 LEd 2d 344, the Court indicated that jury instruction analysis:

> . . . requires careful attention to the words actually spoken to the jury . . . for whether a defendant has been accorded his constitutional right depends upon the way in which a reasonable juror could have interpreted the instruction . . .
>
> . . . the question, however, is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning. Francis 105 SCt at 1971-1972, citing Sandstrom v. Montana, 442 US at 514, 517.

From the perspective of a reasonable juror, the only instruction relative to the state of mind requirement necessary for conviction on Counts I and II was the "knowledge" instruction which they were instructed applied to the instructions as a whole. This is wholly insufficient, as Sec. 152 requires more than knowledge to convict.

The Court of Appeals' condonation of the trial court's failure to adequately instruct on the specific intent element of Sec. 152 in relation to Counts I and II is in total derogation of the authority provided by this Court. *In Re Winship*, (supra); *Rose v. Clark*, (supra); *Francis v. Franklin*, (supra); *Richardson v. Marsh*, (supra).

Furthermore, the Court of Appeals' decision denying Petitioner's claims that a directed verdict resulted by the jury being instructed that "no timely request" was made to amend the schedules of Counts I and II, (Slip Op. pg 5) and the instruction regarding Count III that "nothing in the nature of the bankruptcy proceedings would excuse this Defendant from giving truthful answers", (Slip Op. pg 6) share a common legal basis for reversal. Contrary to the Court's conclusion, neither instruction is legally proper and in both instances the instructions amount to the Court invading the fact-finding process and directing a verdict.

Petitioner did not testify in this cause. He defended solely on the basis that he did not harbor the requisite specific intent by demonstrating that errors or omissions in the filing of his statement of affairs (Count I) and schedule of debts and assets (Count II) as well as his testimony at the Sec. 341 bankruptcy proceeding were inadvertent. Accordingly, the government could not meet its burden if the jury credited Petitioner's filings and testimony to ignorance, mistake, inadvertence or accident.

Cheeks v. United States, _____ US _____, 111 SCt 604, 112 LEd 2d 617 (1991) Although the trial court so instructed, it also eliminated this option from the jury with its self-crafted sua sponte instructions.

The Court concluded the "no timely request" instruction did not preclude the jury from considering Petitioner's claim of inadvertence. (Slip Op. pg 5) The instruction, in the first instance, constitutes a misstatement of the law. The law does not prescribe a time for amendments to bankruptcy schedules. They may be filed at any time before the case is closed. Bankruptcy Rule 1009, *Lucius v. McLemore*, 741 F2d 125 (6th Cir 1984). Despite the clarity of the law, the Seventh Circuit sanctioned its misstatement and condoned an improper fact finding invasion of the jury. It is impossible for a jury to assess facts when their instructions do not accurately state the law.

Contrary to the court's decision, the instruction had a direct bearing on the jury's ability to consider Petitioner's claim of inadvertence. Through government witness Peebles, the jury was told the Bankruptcy Trustee and IRS had been advised of errors and omissions in the schedules and of his belief that the errors were inadvertent. (TT pp. 851, 852) The decision correctly notes this was "early on". At trial several years later, the trial court after hearing this evidence, responded to it by structuring its factual conclusions into the questioned instruction.

By instructing the jury in the fashion it did, the trial court disregarded the law, the evidence, and told the jury there was in fact a time period allowed by law to correct errors or omissions, which here had been discovered "early on"; and it further communicated to the jury that Petitioner did not intend to amend and therefore could not have been inadvertent. The instruction mandates a finding by the jury that Defendant intended to perpetrate a fraud.

Furthermore, the Court notes that at the time of trial, no request, timely or otherwise, had been submitted on Petitioner's behalf. Petitioner asserts that regardless of the time element imposed by the instruction that it mandates a finding of intent to defraud by the jury. By instructing that no request was made, timely or otherwise, to amend, the trial court directed the jury to find that Petitioner could not have been inadvertent because he did not amend.

The trial court's instruction that "nothing in the nature of the Bankruptcy proceedings . . . would excuse this defendant from giving

truthful answers" is also erroneous. The Court reasons the statement does not amount to a directed verdict because it was directed at the nature of a Sec. 341 hearing and not Petitioner's intent.

The nature of the proceedings here were not at issue. The issues relate to truth or falsity and this tendered instruction assumes the answers given were false. Examination of the instruction reveals that its substance would not be changed in the least if the word "false" were to be substituted for the term "truthful". The tendered instruction simply and directly tells the jury the answers given by Petitioner were false and that nothing in the nature of the Bankruptcy proceedings changes that falsity or gave Petitioner an excuse for not being truthful. This is not the law. *Cheeks v. United States*, (supra).

The Court defends the instruction by referencing the trial court's comments to the jury at a point in the trial where it conducted a limited examination of witness Peebles. It was at that point the Court sought to caution the jury that it did not mean to imply whether the Petitioner was guilty or not through its question. (TT pp. 907-908) The Court's assurance to the jury made during the government's case in chief cannot rationally be extended to the instructional phase of the trial.

The Court further defended the instruction by claiming it was proper in lieu of Peeble's testimony that he did not consider the Sec. 341 hearing to be a matter of record. However, the comment of the trial court referenced by the opinion was not made in relation to jury instructions. The comment, as it relates to the reason the trial court questioned Peebles, ignores its factual mandate to the jury.

In *Bollenback v. United*, (supra), SCt at 405, this Court stated:

> In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *Quercia v. United States*, 289 US 466, 469, 53 SCt 698, 699, 77 LEd 1321. `The influence of the trial judge on the jury is necessarily and properly of great weight.' *Starr v. United States*,
>
> 153 US 614, 626, 14 SCt 919, 923, 38 LEd 841, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word.
>
> . . . a conviction ought not to rest on an equivocal direction to the jury on a basic issue. (Emphasis Ours)

The jury instructions at issue here cannot be said to have any practical purpose consistent with the separate functions of the Court and jury. The court's self-crafted instructions directed the jury's verdict on the issue of intent and the Court of Appeals' conclusion affirming same has resulted in undermining of principles announced by this Court in *Rose v. Clark*, (supra); *In Re Winship*, (supra); *Cheeks v. United States*, (supra).

For the foregoing reasons, this Court should grant Petitioner's request for the issuance of a Writ of Certiorari and reverse the Seventh Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, Petitioner requests this Honorable Court order the Solictor General to answer and grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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November ___, 1993

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 92-1760

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD L. LERCH,

Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 91 CR 11—**Allen Sharp,** *Chief Judge.*

ARGUED APRIL 1, 1993—DECIDED JUNE 4, 1993

Before POSNER and RIPPLE, *Circuit Judges*, and TIMBERS, *Senior Circuit Judge.**

TIMBERS, *Senior Circuit Judge*: Appellant Ronald Lee Lerch appeals from a judgment entered on a jury verdict in the Northern District of Indiana, Allen Sharp, *Chief District Judge*, convicting him of knowingly and fraudulently filing in connection with a bankruptcy proceeding a false statement of affairs and schedule of debts and assets as well as making false statements at a Section 341 hearing, all in violation of 18 U.S.C. § 152 (1988).

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* The Honorable William H. Timbers, *Senior Circuit Judge*, United States Court of Appeals for the Second Circuit, sitting by designation.

On appeal, Lerch contends that the court committed numerous errors during his trial and sentencing. Lerch also claims that the court erred in denying his motion to dismiss the indictment for preindictment delay.

For the reasons that follow, we reject Lerch's claims and we affirm the judgment in all respects.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

The instant appeal arises from an audit by the Internal Revenue Service (IRS) of Lerch's tax returns for the years 1977 through 1981. The audit revealed that Lerch owed substantial taxes, penalties and interest. As a result, the IRS issued to Lerch four statutory notices of deficiency. Lerch responded by petitioning the United States Tax Court to contest the notices of deficiency. The tax court scheduled a trial for April 28, 1986.

In the meantime, Lerch was advised by his attorneys that the bankruptcy court would provide a more favorable forum in which to litigate his tax matters. Accordingly, on April 23, 1986, Lerch filed a Chapter 11 petition in the bankruptcy court which resulted in an automatic stay of the tax court proceedings. On April 25, the government filed a motion in the bankruptcy court to lift the automatic stay in order to allow the tax court trial to proceed as scheduled. The bankruptcy court granted the government's motion on April 28. Lerch appealed this decision to the district court, which affirmed the lifting of the stay. After unsuccessfully seeking a continuance, Lerch's case was tried in the tax court on May 1 and 2, 1986. In an opinion dated June 15, 1987, the tax court held that Lerch owed taxes and penalties totalling $350,000. We subsequently affirmed this decision on appeal. *Lerch v. Commissioner*, 877 F.2d 624 (7th Cir. 1989).

Backing up for a moment, on May 14, 1986, Lerch filed a signed statement of financial affairs and schedules of property and debts with the bankruptcy court as required in Chapter 11 proceedings. Lerch had filled out the forms in his own handwriting before giving them to his attorney. The attorney, having been assured by Lerch that they were true and correct, typed them, had Lerch sign them, and filed them with the bankruptcy court. These forms, however, contained a number of false statements. In particular, Lerch greatly understated the value of his personal property at $3,005.28, falsely stated that he had no interest in any real property, and falsely stated that he had made no transfers or gifts of property in the previous year.

As required by Section 341 of the Bankruptcy Code, Lerch attended a hearing with his creditors on May 20, 1986. At the hearing, he was questioned under oath by his own attorney as well as by an attorney from the IRS. In response to questions from the IRS attorney, Lerch testified falsely that, to the best of his knowledge, his statement of affairs and property schedules were true and correct. Lerch also stated that he leased property for $300 a month from K. Araujo, an unrelated man from Brazil. In fact, Lerch owned the home and Araujo was his daughter.

After the IRS investigation indicated that Lerch was omitting property from his schedules, the government moved for a more detailed examination of Lerch's assets pursuant to § 2004 of the Bankruptcy Code. The court granted this motion on July 7, 1986. Since the government was unable to obtain more information regarding Lerch's recent transfers of property, on July 10 it moved for the appointment of a trustee to oversee the possession and control of Lerch's assets and for injunctive relief to preclude Lerch from transferring any more of his property. On July 18, Lerch entered into a stipulation with the government under which he agreed to produce certain documents or provide specific written objections for not doing so, and to be examined in August. Faced with an examination of his assets and transfers, however, Lerch on July 21, 1986 moved to dismiss the bankruptcy proceeding and for relief from discov-

ery. In an opinion dated August 2, the court denied Lerch's motion to dismiss, granted the government's motion for appointment of a trustee, and appointed a trustee to investigate possible fraud committed by Lerch.

On April 24, 1991, Lerch was indicted for filing in connection with his bankruptcy proceeding a false statement of financial affairs, a false schedule of debts and assets, and for giving false statements under oath at a Section 341 hearing, all in violation of 18 U.S.C. § 152. On July 10, 1991, Lerch filed a motion to dismiss the indictment on the ground of preindictment delay. The court reserved ruling on this motion until after trial. At his jury trial, Lerch's defense centered on his claim that he lacked the requisite intent since any errors in his testimony, schedule or statement of affairs were inadvertent. The jury, however, did not accept Lerch's explanation. On January 28, 1992, it convicted him on all counts. On March 2, the court denied Lerch's motion to dismiss for preindictment delay. On March 26, Lerch was sentenced to three concurrent five year terms of incarceration and a $15,000 fine. Judgment was entered on March 30

On appeal, Lerch raises the claims stated above.

II.

(A) *Claims Arising From Trial*

Lerch asserts that the court's jury instructions improperly relieved the government of its burden of proving the requisite specific intent under 18 U.S.C. § 152. *United States v. Key*, 859 F.2d 1257, 1260 (7th Cir. 1988) (under § 152 government must prove intent to defraud bankruptcy court). In particular, Lerch asserts that the court's instructions relieved the government of proving that he acted with knowledge that his statements were false. In assessing this claim, we view the instructions as a whole and will disturb them only if the issues were treated unfairly and inaccurately by the district court. *United States v. Campione*, 942 F.2d 429, 436 (7th Cir. 1991).

At trial, the government had the burden of proving that Lerch "knowingly and fraudulently [made] a false declaration" in relation to the bankruptcy proceeding. 18 U.S.C. § 152. The court directly quoted the above element of § 152 and gave additional instructions regarding the issue of intent. Indeed, the court instructed the jury that "An act is done fraudulently if done with intent to deceive or cheat any creditor, trustee or bankruptcy judge. The prosecutor must also prove beyond a reasonable doubt that the act was done knowingly." Further, the court stated that the government must show that Lerch "made such . . . statement under penalty of perjury knowingly and fraudulently." We hold that these additional instructions, together with the quoted instruction on the elements of § 152, adequately addressed the issue of intent. Viewing the instructions as a whole, it cannot be said that the court did not treat the issues of knowledge and intent fairly and accurately. *Campione, supra*, 942 F.2d at 436.

Lerch also contends that the court's instruction to the jury that he made "no timely request" to amend his schedules, statement of affairs or testimony, amounted to a directed verdict for the government on the issue of his intent. Lerch stresses that his attorney testified that he contacted the trustee and counsel for the IRS "early on" and offered to amend Lerch's petitions. At the time of trial, however, Lerch's attorney had not submitted any request, timely or otherwise, to the bankruptcy court to amend Lerch's schedules, statement of affairs or testimony. Further, the fact that the jury was told that no timely request to amend had been made did not amount to a directed verdict for the government on the issue of intent because it did not preclude the jury from considering Lerch's claim of inadvertence. Indeed, the court specifically instructed the jury that it could not find Lerch guilty if it found that he "act[ed] through ignorance, mistake, inadvertence or accident." Viewing the instructions as a whole, we hold that they were proper and did not amount to a directed verdict for the government on the issue of Lerch's intent.

Lerch further contends that the court also directed a verdict on count three of the indictment by instructing the jury that "nothing in the nature of the Bankruptcy proceedings . . . would excuse this defendant from giving truthful answers to the questions asked" at the § 341 hearing. This statement, however, does not amount to a directed verdict on the issue of Lerch's intent because it was directed at the *nature* of a § 341 hearing and not at Lerch's intent. Indeed, the court told the jury that it was making "no reference at all to whether or not [Lerch] is guilty of the charge. That's for the jury to decide." Further, in view of testimony by Lerch's attorney that he did not consider the hearing a matter of record, the court properly sought to ensure that the jury did not interpret this testimony to mean that "testimony in [a § 341] hearing is some way immune from prosecution." Since the court instructed the jury thoroughly on the elements of § 152, and looking, as we must, at the instructions as a whole, *Campione*, *supra*, 942 F.2d at 436, we cannot say this statement amounted to a directed verdict for the government on the issue of Lerch's intent.

Lerch also asserts that the court abused its discretion in refusing to allow his attorney to define "reasonable doubt" during closing arguments. This claim need not detain us long. Lerch concedes that it is settled law in this Circuit that attorneys should not attempt to define reasonable doubt to a jury. *United States v. Langer*, 962 F.2d 592, 600 (7th Cir. 1992) ("It has been, and continues to be, 'our opinion that . . . defining reasonable doubt presents a situation equivalent to playing with fire.' "). In view of this settled precedent, as well as the fact that Lerch offers no compelling reason for us to reconsider its wisdom, we hold that the court did not abuse its discretion in prohibiting Lerch's counsel from defining reasonable doubt.

Lerch also asserts that the court abused its discretion in allowing the tax and bankruptcy court opinions entered in his prior proceedings to be introduced in evidence at the instant trial. In particular, Lerch says that these opin-

ions were inadmissible because they were irrelevant and highly prejudicial. Fed. R. Evid. 401 and 403. In reviewing this claim, we are mindful of the special deference we accord to the evidentiary rulings of a trial court. *United States v. Kaden*, 819 F.2d 813, 818 (7th Cir. 1987). Evidentiary decisions of the trial court will be reversed only where the court has abused its discretion. *United States v. Zapata*, 871 F.2d 616, 621 (7th Cir. 1989).

As for the tax court opinion, we believe that, Lerch, in cross-examining the government's tax court attorney regarding the lengthy procedural history of the tax case, the civil fraud penalties discussed in the tax court's opinion, and the nonappearance of his attorney at that proceeding, "opened the door" for the opinion's admissibility. *United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988) ("curative admissibility" doctrine allows introduction of inadmissible or irrelevant evidence where other party opens the door), *cert. denied*, 489 U.S. 1084 (1989). Further, even if Lerch had not opened the door to the admission of the tax court opinion, both opinions were admissible under Fed. R. Evid. 404(b) as evidence of past wrongs. The opinions demonstrate Lerch's motive for hiding his assets by lying in his bankruptcy proceedings and his intent to avoid income taxes. The events underlying both opinions are also similar and close in time to the instant case, and their probative value is not substantially outweighed by unfair prejudice. *Zapata*, *supra*, 871 F.2d at 621. We hold that the court did not abuse its discretion in admitting the opinions in evidence at Lerch's trial.

Lerch also contends that, taken as a whole, the court's jury instructions were highly prejudicial, thus warranting reversal. This claim, which in essence is a combination of Lerch's unsuccessful claims discussed above, coupled with numerous additional claims, likewise fails. Having examined the court's instructions, we hold that they were consistent, legally proper, and not prejudicial to Lerch. To the extent that the instructions may have been erroneous, Lerch has failed to demonstrate that such errors were not harmless. *United States v. Verkuilen*, 690 F.2d

648, 655 (7th Cir. 1982). Moreover, in view of the formidable evidence of Lerch's guilt, it is improbable that the alleged errors in the instructions prejudiced him. *Id.*

(B) *Claims Arising From Sentencing*

Lerch contends that the court improperly refused to make a factual finding on an allegedly disputed calculation found in his presentence report. The item in the presentence report to which Lerch refers, however, was not a loss figure for the offense as Lerch claims, but an estimate of Lerch's total unreported assets. Since this figure was not in dispute, the court did not abuse its discretion in refusing to make a factual finding on it at sentencing.

Lerch also asserts that the court improperly made payment of his tax liability a prerequisite to consideration of any future Fed. R. Crim. P. 35 motions for a reduction of his pre-guidelines sentence. Contrary to Lerch's assertion, however, the court did not make payment of his taxes a requirement for reducing his sentence. The court said only that it "may, repeat may" take into account Lerch's efforts to satisfy his tax liabilities when considering any motions for a reduction of his sentence. This statement in no way supports Lerch's claim that a reduction of his sentence was predicated on his efforts to repay his taxes. The court said only that it would *consider* evidence of rehabilitation and acceptance of responsibility if Lerch abandoned his efforts to avoid his tax obligations. Adopting Lerch's interpretation would be totally to misconstrue the court's remarks. We hold that the court clearly did not abuse its discretion in sentencing Lerch.

(C) *Claim of Preindictment Delay*

Lerch also claims that the court abused its discretion in denying his motion to dismiss the indictment for preindictment delay. While Lerch failed to set forth a legal basis for this claim in his brief, at oral argument he asserted that his claim was based on a violation of his right

to due process. *United States v. Fuesting*, 845 F.2d 664, 667 (7th Cir. 1988). Even if we accept due process as the basis for his claim, however, Lerch has not carried his burden of showing a violation of his right to due process.

We have recognized two different standards for establishing a violation of due process by delay. *United States v. Koller*, 956 F.2d 1408, 1415 (7th Cir. 1992). Under one test, Lerch has the burden of proving actual and substantial prejudice before the burden shifts to the government to show the reason for the delay. *Id.* Under the second test, Lerch has the burden of showing both prejudice and improper motive. *Id.* Here, since Lerch has not shown actual and substantial prejudice, nor improper motive, causing or resulting from the five year delay between the IRS investigation and the indictment, his claim fails under either test.

Lerch claims that the government's preindictment delay prejudiced him in that it caused his attorneys to forget many of the details surrounding the events at issue. In view of the fact that Lerch misled and failed to inform his attorneys of many of his actions involving the transfer of his property, however, he cannot now claim that he was prejudiced by the loss of memory by his attorneys. *United States v. Brock*, 782 F.2d 1442, 1444 & 1447 (7th Cir. 1986) (prejudice cannot be shown through the loss of memory). Further, Lerch's claim is comprised of vague and speculative allegations which are insufficient to satisfy his burden of actual or substantial prejudice. *Fuesting*, *supra*, 845 F.2d at 669. Since Lerch did not demonstrate actual prejudice, we hold that the court did not abuse its discretion in denying his motion to dismiss the indictment for preindictment delay.

III.

To summarize:

We hold that the court did not commit any reversible errors during Lerch's trial or at his sentencing. We also

hold that the court properly denied Lerch's motion to dismiss the indictment on the ground of preindictment delay. We affirm the judgment in all respects.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 7, 1993

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

Hon. William H. Timbers, Senior Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division. No. 91 CR 11 Allen Sharp, *Chief Judge.*
No. 92-1760 v.	)	
RONALD L. LERCH *Defendant-Appellant.*	)	

ORDER

On June 22, 1993, defendant-appellant filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

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* Hon. William H. Timbers,, United States Court of Appeals for the Second Circuit, sitting by designation.